Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1118

FORD MOTOR COMPANY,
Petitioner,

v.

W. F. HOLT & SONS, INC., and BRISTOL STEEL & IRON WORKS, INC.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

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Respondents.

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals for the Sixth Circuit

Petitioner, Ford Motor Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered on December 6, 1971, in the cause entitled **Ford Motor Company v. W. F. Holt & Sons, Inc, and Bristol Steel & Iron Works, Inc.**, No. 71-1368.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit filed December 6, 1971 (Appendix A, infra) which reversed the judgment of the District Court in favor of petitioner against respondent, W. F. Holt & Sons, Inc., and the opinion of said Court filed January 7, 1972 (Appendix B, infra), denying petitioner's petition for rehearing have not yet been reported. The opinion of the District Court for the Middle District of Tennessee, filed February 24, 1971 (Appendix C, infra), is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered December 6, 1971. The Supreme Court has jurisdiction of this case under 28 USC 1254(1), 28 USC 2101(c) and Supreme Court Rule 19-1(b). The District Court had jurisdiction under 28 USC 1332(a).

QUESTIONS PRESENTED

1. In an action on a contract for indemnity, if the indemnitor alleges facts establishing the indemnitee's liability to pay the claim for which it seeks indemnification, can the indemnitor be allowed to change its theory on appeal after a judgment for the indemnitee and contend that the indemnitee was not liable to pay the claim?

2. For the indemnitee to recover on an indemnity contract providing that the indemnitor shall be exclusively responsible for, shall bear and shall relieve the indemnitee from liability for loss, expense, damage or claims, must the indemnitee prove it was liable to pay the claim for which it seeks indemnification if the indemnitor refused indemnitee's request to assume the defense of and settlement negotiations in the action on the claim against

indemnitee and the indemnitee thereafter settled the claim by paying an amount which the parties stipulate is reasonable?

STATEMENT

Nature of the Case

On March 9, 1971, the District Court awarded petitioner judgment against respondent Holt in the amount of $29,285.89 and denied Holt a recovery for a like amount against respondent Bristol, which had been made a third party defendant by Holt. The judgment was awarded petitioner under an indemnity agreement between it and Holt for the amount paid by petitioner to settle a claim against it for damages for bodily injury to an employee of Bristol which arose in connection with work on plaintiff's property under a construction contract in which Holt was general contractor and Bristol was a subcontractor. Holt appealed both from the judgment against it in favor of petitioner and from the District Court's denial of a judgment in favor of Holt against Bristol. Petitioner did not make any claim against Bristol and is not involved in the issues between Bristol and Holt. The Court of Appeals reversed the judgment of the District Court.

Course of Proceedings

Petitioner filed its complaint against Holt on April 15, 1969, to recover with interest the amount it paid John W. Elizer in settlement of his action for damages for bodily injury against petitioner and petitioner's costs of defending that action. The complaint alleged that Holt was liable to reimburse petitioner for these payments under General Condition 31 of the construction contract between petitioner and Holt, which required Holt to indemnify petitioner for losses, expenses or claims resulting from bodily injury arising in connection with work under said

contract. The complaint alleged that Elizer suffered bodily injury during the course of the performance of the contract which did not arise from the "sole negligence" of petitioner or its employees; that petitioner gave notice of Elizer's action to Holt and demanded that Holt assume the defense of the case in accordance with Condition 31; but that Holt refused (App. pp. 3a-6a).[1] Condition 31 provided for indemnity for claims resulting from the negligence of petitioner or its employees, but excluded indemnity for "liability for the willful misconduct or the sole negligence" of petitioner or its employees.

Holt filed an answer admitting that Elizer suffered injury during the course of the performance of the contract and that it refused to assume defense of his action and alleging that the injuries sustained by Elizer resulted from the "sole negligence" of the petitioner and its employees. There was nothing in Holt's answer to the effect that petitioner was not liable to Elizer or that Elizer was guilty of contributory negligence (App. pp. 6a-9a).

On January 11, 1971, a pretrial order was entered stating that it was Holt's theory that Elizer was injured from the "sole negligence" of the employees of petitioner (App. p. 27a). There was nothing in the order to the effect that it was Holt's theory that petitioner was not liable to Elizer or that it could not recover indemnity because Elizer had been guilty of contributory negligence. The pretrial order stated the issues between petitioner and Holt to be whether Holt was liable to petitioner under the provisions of the contract and whether the settlement between petitioner and Elizer was advisable and reasonable and did not include any issue as to whether petitioner was liable to Elizer or whether contributory negligence of Elizer prevented petitioner from recovering from Holt

[1] The printed appendix filed in the Court of Appeals is cited as "App."

(App. p. 28a). At the trial on January 12, 1971, Holt did not raise the defense that petitioner was not liable to Elizer or that contributory negligence by Elizer prevented petitioner from recovering under the indemnity agreement. Holt's only defense was that Elizer's injury resulted from the "sole negligence" of petitioner. Petitioner contended that Holt and Bristol were guilty of negligence which caused or contributed to Elizer's injury.

Facts

On November 28, 1966, petitioner and Holt entered into a contract whereby Holt was employed as general contractor to do construction work at petitioner's glass plant in Nashville, Tennessee (App. pp. 3a-4a, 6a-7a). General Condition 31 of the contract (App. p. 57a) provided that Holt:

> "shall be exclusively responsible for, shall bear and shall relieve the Owner from liability for all loss and/or expense and/or damage and/or claims resulting from bodily injury . . . arising out of, or in connection with the performance of any work called for by this Contract, . . . whether such loss, expense, damage and/or claims be caused by or result, in whole or in part, from the negligence or other conduct of the Contractor, any Subcontractor and/or the Owner, or any of the employees, agents or servants of any of them, or any other person or persons whatsoever . . ."

General Condition 31 further provided that Holt:

> "shall neither be responsible nor relieve the Owner from liability for the willful misconduct or the sole negligence of the Owner or any of its employees, agents or servants."

General Condition 26 of the construction contract required Holt to comply with all safety rules and practices of petitioner and to provide and maintain safeguards for

the protection of the workmen (App. p. 61a). Under its subcontract, Bristol also agreed to be bound by Condition 26 (App. pp. 11a, 13a).

Petitioner's safety rules pertaining to construction work in an area containing a crane were that, before a construction worker entered the area, petitioner's supervisor of that area was to be notified and, when construction workers were working near a moving crane, the construction company was to station a flagman on the ground to give warnings of any danger to the workmen from the crane (App. pp. 53a, 80a-81a, 83a, 84a, 93a, 112a, 113a). It was Bristol's duty to protect its own workers from being injured while engaged in work of the type done by Elizer (App. p. 113a).

On April 14, 1967, Bristol was performing steel erection work on a building containing an overhead crane. Bristol's employee Elizer came into the building to work in the vicinity of the crane (App. p. 18a). No notice was given to petitioner's supervisor in that area that Elizer would be inside working near the crane (App. pp. 53a-54a, 81a, 85a, 86a). No flagman was placed on the ground to protect Elizer from the crane (App. pp. 53a-54a, 81a, 85a, 86a, 101a, 107a). While Elizer was working near the crane rail, the crane moved and injured him.

Elizer sued petitioner for $75,000 for the injuries he received, alleging that petitioner was guilty of negligence which caused his injuries (App. pp. 42a-45a). On November 3, 1967, and January 8, 1968, petitioner requested that Holt assume the defense of Elizer's action in accordance with Condition 31 of the contract and stated that, if Holt failed to furnish the defense, petitioner would look to Holt for reimbursement for all expenses incurred. On December 3, 1968, petitioner again requested Holt to assume the defense of the case and notified it that Elizer's attorney had offered to accept $33,000 in settlement of his claim and that petitioner wanted Holt to take over the

settlement negotiations but that, if it did not, petitioner would negotiate for settlement and might make what it considered to be a reasonable settlement, in which case it would look to Holt for reimbursement of the amount paid in settlement. Holt declined all these requests (App. pp. 38a, 45a-48a).

On January 15, 1969, petitioner paid Elizer $25,000 in settlement of his claim and paid its attorneys $1,031.90 for fees and expenses incurred in defending and settling that case. Holt stipulated with petitioner that these payments were reasonable (App. p. 37a).

Disposition in District Court

On February 24, 1971, the District Court filed a memorandum finding that Elizer's injuries did not result from the "sole negligence" of petitioner and that petitioner was entitled to recover against Holt because "the indemnity agreement provides for indemnifying the owner against its own negligence (eliminating sole negligence and willful misconduct)" (App. p. 55a). The District Court rejected the assertion that contributory negligence of Elizer would have barred a recovery by plaintiff against defendant in this case and held that the only issue as to negligence was whether the plaintiff's negligence was the "sole negligence" (App. p. 56a). The District Court held that, since Holt refused petitioner's request that it assume defense of the action by Elizer, Holt was bound by the reasonable and good faith settlement by petitioner (App. p. 55a).

Disposition in the Court of Appeals

On its appeal to the Court of Appeals, Holt departed from its theory in the District Court that Elizer's injury resulted from the "sole negligence" of petitioner and asserted a new theory to the effect that petitioner could not recover under the indemnity agreement because Elizer

was contributorily negligent and, therefore, that petitioner was not liable to Elizer. In brief and argument in the Court of Appeals, petitioner insisted that Holt was not entitled to raise this defense on appeal because it was contrary to the allegations of Holt's answer and constituted a change of theory on appeal after an adverse judgment to a defense that was not presented in the trial court and therefore was not before the appellate court. Nevertheless, the Court of Appeals accepted Holt's change of theory and reversed the judgment of the District Court and held that there was no legal liability on the part of petitioner to Elizer because of Elizer's contributory negligence and that the indemnity agreement indemnified against liability only.

The Court of Appeals disagreed with the District Court's construction of the agreement as protecting petitioner against claims as well as liability. The Court of Appeals construed the agreement as requiring Holt only to relieve petitioner from liability and held that, under this contract of indemnity against liability, the indemnitee must prove that the judgment could not have been avoided and that a claim when no legal liability exists does not give rise to a right of indemnity. In support of this statement, the Court of Appeals cited 41 Am.Jur. 2d, p. 722, Sec. 31, and stated it was satisfied that Tennessee would follow this rule, citing **Finley v. U.S. Casualty Co., et al.**, 113 Tenn. 592. The **Finley** case does not indicate that Tennessee would follow the rule of the Court of Appeals in the instant case and there is no other Tennessee case following that rule. The Court of Appeals did not mention its conflicting holding in **Tankrederiet Gefion A/S v. Hyman Michaels Company** (6th Cir. 1969), 406 F2d 1039, 1043, that, if the indemnitee makes a settlement of a case after its defense was tendered to and refused by the indemnitor, the rule as to proof is changed and the proof required in order for the indemnitee to recover would be "potential liability and reasonableness of settlement".

REASONS FOR GRANTING THE WRIT

1. By Allowing Holt on Appeal to Change to a Theory of Defense Directly Contradictory to Its Theory in the District Court, the Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings.

In its answer, Holt alleged that "any injuries sustained by the said John W. Elizer resulted from the sole negligence of the servants, agents or employees of the Plaintiff, Ford Motor Company" (App. p. 9a). This allegation excludes contributory negligence of Elizer and establishes petitioner's liability to Elizer. It is directly contrary to the theory, which Holt asserted for the first time on appeal, that Ford was not liable to Elizer. The allegation in Holt's answer that Elizer's injury resulted from the "sole negligence" of petitioner's employees is binding on Holt and estops Holt from contending to the contrary. **Aladdin Ind. v. Associate Transp.**, 45 Tenn. App. 329, 323 SW 2d 222, cert. den. 361 U.S. 865; **New York Life Ins. Co. v. Seighman** (6th Cir. 1944), 140 F2d 930. To allow Holt to assert a new theory of defense on appeal that was directly contrary to its theory in the District Court and to reverse the judgment of the District Court on the basis of this new defense is such a departure by the Court of Appeals from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision. Supreme Court Rule 19-1(b).

The District Court clearly understood that Holt was contending that petitioner's employees were the only persons guilty of negligence which contributed to Elizer's injuries and that Holt was not contending that Elizer was guilty of contributory negligence. This is shown by the pretrial order which states "It is the theory of the defendant that the facts of the said accident do not come

within the terms of the hold harmless or indemnity provisions contained in Condition 31 of the said contract, but rather come within the exception set out in said Condition, in that the said John W. Elizer was injured either from the wilful misconduct or the sole negligence of the employees of the plaintiff" (App. p. 27a).

When Holt raised for the first time on appeal the contention that petitioner was not liable to Elizer, petitioner pointed out in its brief (pp. 10-11) that Holt could not be allowed to make this change of theory on appeal to a contradictory theory after an adverse judgment, citing **Corbin v. Baltimore & O.R.R.** (6th Cir. 1956), 234 F2d 88, and that this defense was not before the appellate court since Holt had not presented it in the trial court, citing **E. I. duPont de Nemours & Co. v. Martin** (6th Cir. 1949), 174 F2d 602.

Hankinson v. Pennsylvania Railroad Company (3d Cir. 1960), 280 F2d 249, is in point and is in direct conflict with the decision of the Court of Appeals in the instant case on the same matter. In the **Hankinson** case, the Court of Appeals for the Third Circuit held that, where the indemnitor recognized in the trial court the liability of the indemnitee to pay the claim for which it sought indemnification, the indemnitee could not be denied indemnification on appeal by the indemnitor on the theory that the indemnitee was not liable to pay the claim, even though the trial court had found that the indemnitee was not negligent.

In the District Court the parties stipulated that petitioner paid Elizer $25,000 in settlement of his action for damages and that "The amount paid in said settlement was reasonable under all the circumstances" (App. p. 37a). If petitioner had not been liable to Elizer because of contributory negligence, the settlement of $25,000 would

obviously not have been reasonable. Therefore, by stipulating that the settlement was reasonable, Holt in effect stipulated that Elizer was not guilty of contributory negligence and that petitioner was liable to Elizer.

In view of this stipulation, in addition to Holt's answer alleging sole negligence on the part of petitioner, petitioner was clearly justified in not introducing evidence at the trial to establish its liability to Elizer. Since its liability had been established by Holt's answer and the stipulation, evidence to prove liability was unnecessary. **F&D Property Co. v. Alkire** (10th Cir. 1967), 385 F2d 97. Evidence of admitted facts should be excluded as irrelevant. **Wilson v. Maury County Board of Education**, 42 Tenn. App. 315, 326, 302 SW 2d 502.

The finding by the Court of Appeals that "there was no legal liability" against petitioner is directly contrary to the stipulation of the parties that the $25,000 settlement paid to Elizer was reasonable. "Ordinarily courts have no power to make findings contrary to the terms of a stipulation." **Burstein v. United States** (8th Cir. 1956), 232 F2d 19, 22. "When a party makes a concession or adopts a theory by stipulation and his cause of action is determined on this concession or theory, then that party must abide by his decision even on appeal by certiorari." **Bearman v. Camitsos**, 215 Tenn. (1964), 231, 236, 385 SW 2d 91.

Since Holt's answer alleged facts establishing petitioner's liability to Elizer and the parties stipulated that the settlement was reasonable, there has never been a trial on the issue of petitioner's liability to Elizer. If there had been a trial on this issue, petitioner could have shown that it was liable to Elizer because it had constructive knowledge that Elizer was working near the crane rail, since Ford contracted to have the work done; that,

after the crane had remained stationary for a long period of time while Elizer was working near the rail (App. pp. 42a-43a), it moved and struck him without its whistle being blown as required by petitioner's own rules; and that Elizer had the right to assume that Holt and Bristol would not breach their duty to protect him from the crane (App. pp. 61a, 113a). It was so obvious that Elizer was not guilty of contributory negligence that would bar a recovery by him against petitioner that Holt did not plead this as a defense but alleged "sole negligence" on the part of petitioner and stipulated that the $25,000 settlement paid Elizer was reasonable.

If it had been an issue in the District Court, petitioner might also have contended that contributory negligence on the part of Elizer would not preclude petitioner's liability to him because petitioner's negligence was gross negligence and, under Tennessee law, ordinary contributory negligence by a plaintiff does not bar a recovery where the defendant is guilty of gross negligence. See **Phelps v. Magnavox Company of Tennessee, Inc.**, 466 SW 2d 226, 229, where it is stated "Our law is clear that contributory negligence will not bar recovery in an action based on gross and wanton negligence unless the contributory negligence is also gross and wanton." On this point it is significant that, in his declaration against petitioner, Elizer alleged that the operation of the crane by petitioner's employee was "gross negligence" (App. p. 43a), and Holt's answer in the District Court alleges that petitioner's employees "were guilty of gross negligence" (App. p. 9a). If Elizer and Holt were correct in these allegations, then petitioner would have been liable to Elizer, notwithstanding contributory negligence on his part.

2. The Decision of the Court of Appeals That Petitioner as Indemnitee Was Required to Prove Its Liability to the Injured Party, Even Though the Indemnitor Had Refused to Assume Defense of the Claim and Denied Liability Under the Contract, Is in Direct Conflict With Decisions on the Same Matter by Courts of Appeals for the Seventh, Eighth and Tenth Circuits.

Petitioner contends that the Court of Appeals has misconstrued the indemnity agreement as providing indemnification only against liability. The agreement requires Holt to be exclusively responsible for and to bear as well as to relieve the owner from liability for "all loss and/or expense and/or damage and/or claims." This broad language does not limit indemnification to liability only and the District Court was correct in construing the agreement as providing for indemnification against claims. However, even if the agreement provided indemnification against liability only, the decision of the Court of Appeals that petitioner could not recover because it did not prove its liability to Elizer is in direct conflict with the decisions of the Courts of Appeals for the Seventh, Eighth and Tenth Circuits in the cases of **Chicago Rock Island & Pacific Ry. Co. v. United States** (7th Cir. 1955), 220 F.2d 939, **Missouri Pacific Railroad Co. v. Arkansas Oak Flooring Co.** (8th Cir. 1970), 434 F2d 575, and **Chicago, R. I. & P.R. Co. v. Dobry Flour Mills** (10th Cir. 1954), 211 F2d 785, cert.den. 348 US 832.

In **Chicago Rock Island & Pacific Ry. Co. v. United States**, *supra*, the Court of Appeals for the Seventh Circuit held that a finding by the trial court that the indemnitee was not negligent so as to be liable to the injured party did not preclude a recovery of indemnification from the indemnitor. The Court held at 220 F2d 941 that it did not follow from the finding of no negligence by the trial court "that a similar finding would have been made

by the triers of fact in an action by the employee against the plaintiff" and that the indemnitee "was required at that time to use its foresight rather than its hindsight in evaluating the situation relative to its probable liability" and that it made a fair and reasonable settlement of its liability.

In **Missouri Pacific Railroad Co. v. Arkansas Oak Flooring Co.**, *supra*, the Court of Appeals for the Eighth Circuit held at 434 F2d 580: "In seeking indemnity, the indemnitee need not prove its legal liability to the injured party when its indemnitor denies liability under a contract and refuses to assume defense of the claim or to otherwise hold the indemnitee harmless for any loss."

In **Chicago, R.I. & P.R. Co. v. Dobry Flour Mills**, *supra*, the Court of Appeals for the Tenth Circuit held at 211 F2d 788 "where the indemnitor denies liability under the indemnity contract and refuses to assume the defense of the claim, then the indemnitee is in full charge of the matter and may make a good faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of the damage" (citing cases), and stated "A contrary rule would make the right to settle meaningless in cases where the indemnitor has denied liability. On this subject, the only question which should have been submitted to the jury was whether the Railroad made a reasonable, prudent and good faith compromise and settlement."

In making its decision in the instant case, the Court of Appeals did not cite any federal cases and **Finley v. U. S. Casualty Co., et al.**, 113 Tenn. 592, which it cited, does not establish in Tennessee the rule adopted by the Court of Appeals. In fact, it is more likely that Tennessee would follow the rule adopted in the three other circuits than the rule in the instant case. Therefore, the direct conflict between the decision of the Court of Appeals in the instant

case and the decisions of the Courts of Appeals for the Seventh, Eighth and Tenth Circuits on the same matter should be resolved by the Supreme Court Rule 19-1(b).

CONCLUSION

The petition for a writ of certiorari should be granted. The decision of the Court of Appeals should be reversed and the judgment of the District Court in favor of petitioner should be affirmed.

Respectfully submitted

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APPENDIX A

No. 71-1368

United States Court of Appeals
For the Sixth Circuit

Ford Motor Company,
Plaintiff-Appellee,
v.
W. F. Holt & Sons, Inc.,
Defendant and Third-Party
Plaintiff-Appellant,
v.
Bristol Steel and Iron Works, Inc.,
Third-Party Defendant-Appellee.

Appeal from the United States District Court for the Middle District of Tennessee, Nashville Division.

Decided and Filed December 6, 1971.

Before: Celebrezze, Peck, and Miller, Circuit Judges.

Per Curiam. W. F. Holt & Sons, Inc. (general contractor) contracted with Ford Motor Company (owner) to erect at the owner's glass plant in Nashville, Tennessee, additions to certain existing structures. The contract contained indemnity clause 31,[1] providing that the general

[1] The indemnity clause 31 reads as follows:

"The Contractor shall be exclusively responsible for, shall bear, and shall relieve the Owner from liability for all loss and/or expense and/or damage and/or claims resulting from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and/or on account of damage to or destruction of property, including that of the Owner, and/or on account of loss of use of such property (except as otherwise specifically provided in the section hereof entitled 'Owner's and Con-

contractor shall relieve the owner "from liability for all loss and/or expense and/or damage and/or claims resulting from bodily injury . . . sustained by any person or persons . . . arising out of, or in connection with the performance of any work called for by this Contract . . ."

Holt, as the general contractor, subcontracted the structural steel work called for by the contract to Bristol Steel and Iron Works, Inc. As pointed out by the district judge, all parties conceded that the subcontract contained the same indemnification obligations on the part of Bristol Steel to Holt as those assumed in the general contract by Holt to Ford.

In performing the work under the subcontract an employee of Bristol Steel sustained personal injuries and in consequence instituted an action against Ford for recovery, alleging that the injuries were caused by Ford's negligence. During the pendency of this suit the owner undertook to "vouch in" the general contractor under the indemnification agreement. The general contractor refused to take any part in the defense of the action. Thereafter, the owner effected a settlement of the claim of the Bristol Steel employee for the sum of $25,000 and obtained a

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tractor's Responsibilities—Fire and Certain Other Risks'), arising out of, or in connection with the performance of any work called for by this Contract, including all work assigned to the Contractor under this Contract, whether such loss, expense, damage and/or claims be caused by or result, in whole or in part, from the negligence or other conduct of the Contractor, any Subcontractor and/or the Owner, or any of the employees, agents or servants of any of them, or any other person or persons whatsoever, except the Owner, or any other person or persons whatsoever, except that, anything to the contrary notwithstanding contained herein, the Contractor shall neither be responsible nor relieve the Owner from liability for the willful misconduct or the sole negligence of the Owner or any of its employees, agents or servants."

general release. In defending the action, Ford incurred expenses in the amount of $1,031.90.

The present action was instituted in the court below upon diversity grounds by Ford against Holt for indemnity under the indemnification agreement for the amount paid in settlement of the personal injury claim and the expenses incurred incident to the defense of the action. In turn Holt brought Bristol Steel into the action as a third-party defendant seeking to recover indemnity from it under its indemnification agreement in the event it should be cast in the action instituted by Ford.

The district court held in its memorandum opinion that the Bristol Steel employee was guilty of contributory negligence which proximately contributed to the accident and consequently that there was no legal liability on the part of Ford to the employee.[2]

Nevertheless, construing the indemnification agreement between Ford and Holt as one which protected Ford not only against liability but also against any "claims," he reached the conclusion that Ford had the right to "vouch in" Holt and that Holt was liable to Ford because it failed after demand to take over or to participate in the defense

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[2] That this was the finding of the district court conclusively appears from its memorandum:

> "From the evidence, after taking into consideration the intelligence, frankness, demeanor and attitude of the witnesses, it is clear that the injured employee, Elizer, was guilty of negligence which proximately contributed to the accident."

Later in its memorandum the court stated:

> "As it has been held by this court that the employee was guilty of negligence which proximately contributed to the accident, and would have served to bar Mr. Elizer's recovery in the original cause, the general contractor, as indemnitee, has failed to sustain his burden of proof regarding his legal liability in the original action."

of the action of the employee against Ford. The court further held that the settlement effected by Ford was a reasonable one made in good faith and that it was not within the contemplation of the indemnification clause "that the owner must defend all claims to a legal conclusion at its risk." We must disagree with the district court's interpretation of the indemnification agreement. As we construe the language of the agreement between Ford and Holt, the obligation which Holt undertook was not one to assume responsibility for any "claims" which might be filed against Ford, but only to relieve Ford from "liability" for claims arising from the work performed under the contract either by the general contractor or by any subcontractor. The general rule is that under a contract of indemnity against liability as distinguished from indemnity against loss or damage, "the indemnitee must allege and prove that the judgment could not have been avoided, and it is not enough to allege and prove that the injured person obtained judgment against the indemnitee." 41 Am. Jur. 2d p. 723, Sec. 31. As otherwise stated, "a mere claim or demand against an indemnitee when no legal liability exists does not give rise to a right to indemnity under an agreement to indemnify against liability in the sense of accrued liability." Ibid. p. 722. See also *42 C.J.S.* p. 603, Sec. 25. We are satisfied that Tennessee would follow this well-established general rule. *Cf. Finley v. U. S. Casualty Co., et al.*, 113 Tenn. 592.

In this case, as pointed out, the district judge expressly found that the Bristol Steel employee was guilty of such proximate contributory negligence as would bar his recovery, with the consequence that although Ford saw fit to settle the claim it was not actually legally liable to do so. This finding of the district judge is amply supported by the record.

As there was no legal liability against Ford and as the indemnity agreement was one indemnifying against *liability* for claims or damage only, it follows that the district judge was in error in his holding that Ford was entitled to judgment against Holt by merely making demand upon it and undertaking to "vouch" it in. It is a necessary corollary that Holt was not entitled to recover against Bristol Steel as a third-party defendant.

The judgment of the district court, insofar as it grants a recovery in favor of Ford against Holt, including the costs of action, must be reversed. In all other respects the judgment below is affirmed.

APPENDIX B

United States Court of Appeals
For the Sixth Circuit

Ford Motor Company,
Plaintiff-Appellee,
v.

W. F. Holt & Sons, Inc.,
Defendant and Third-Party Plaintiff-Appellant,
v.

Bristol Steel and Iron Works, Inc.,
Third-Party Defendant-Appellee.

No. 71-1368.

ORDER

(Filed January 7, 1972)

Before: Celebrezze, Peck and Miller, Circuit Judges.

In this action appellee Ford Motor Company has filed a petition for rehearing requesting that our per curiam opinion of December 6, 1971, be vacated and the judgment in favor of the appellee below be affirmed or, in the alternative, that the action be remanded to the district court for a trial of the issue "of whether Ford was liable to Elizer in the action in which it paid him the settlement." A number of grounds are assigned in support of the petition, but we find it necessary to discuss briefly only three of them.

It is first said that the district court's clear and explicit finding that Elizer was guilty of proximate contributory negligence which would have barred any recovery on his part in his action against Ford is directly contrary to the

stipulation entered into by the parties that "the amount paid in said settlement was reasonable under all the circumstances." We find this contention to be without merit. The stipulation concerned only the reasonableness of the amount paid and was not directed to the question of contributory negligence or legal liability.

The second point to the effect that Holt did not specifically plead contributory negligence on the part of Elizer is irrelevant. The burden of proof rested upon Ford to show that it was entitled to indemnification under the terms of the agreement. Since we have construed the indemnification agreement to be one against legal liability and not against mere claims, this burden could be carried by Ford only by showing that it had incurred a legal liability to Elizer as a result of the accident.

Having heard all of the testimony the district judge concluded that there was no such legal liability and that Elizer was clearly guilty of proximate contributory negligence. In addition to his general conclusions on this subject, quoted in our per curiam opinion, it is significant to note that in his memorandum opinion he made specific findings upon which he based his ultimate conclusion of contributory negligence.[1] That the district court's findings relative to contributory negligence were not beyond the scope of the issues presented by the parties is made

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[1] The uncontroverted proof is that at the time of the accident Elizer was physically on the crane track. Furthermore, in the performance of his work, he was not required to be on the track. In fact, while on the track he could not perform his job. Without objection thereto, a superintendent testified that in order to rest, Elizer had probably stepped up to the track rather than climb down the wall to the ground. Elizer knew of the existence of the crane, admitted that if he had looked he could have seen the crane move, but stated he did not look. He admitted that the crane made some noise but asserted that the crane did not sound its siren. He stated that it was his understanding that the owner's safety rules required that the horn be sounded. In addition, he asserted that a person on the ground, directing the crane operator, was supposed to keep a lookout ahead of the crane.

manifest by the court's pretrial order in which he stated that one of the issues is whether "the defendant [is] liable to the plaintiff under the provisions of the contract between the plaintiff and the defendant?" Stated in this way, the hearing necessarily would require an examination of the facts on the basis of alternative interpretations which may be given to the indemnification agreement. Also, while Holt did not specifically rely upon Elizer's contributory negligence in its answer, it did generally deny "that it has breached its obligation under General Condition 31 of said construction contract or in any other manner and denies that it is indebted to the plaintiff for any sum or sums." Further, the pretrial order as well as Holt's statement of facts on which it would rely indicate that its theory was that the accident was due to the "sole negligence" of Ford's employees. This necessarily injected into the case the possibility of negligence on the part of someone other than Ford's employees and its causal effect. If Elizer himself were guilty of proximate negligence, as the district court found, then the accident was not due to the "sole negligence" of Ford's employees.

An additional point in the petition to rehear is that Ford has never had its day in court on the question of contributory negligence. However, in view of the pleadings, the pretrial order, the statements of the parties as to their respective theories, and the nature of the testimony at the hearing, we think it is evident that Ford has had its day in court on all issues involving its right to recover against Holt under the indemnification agreement.

Having considered all of the grounds assigned in support of the petition, it is Ordered that the said petition for rehearing be and the same is hereby denied.

Entered by Order of the Court

JAMES A. HIGGINS

Clerk

APPENDIX C

In the United States District Court for the
Middle District of Tennessee
Nashville Division

Ford Motor Company,

vs.

W. F. Holt & Sons, Inc.,

Civil Action.
No. 5384.

MEMORANDUM

(Filed Feb. 24, 1971)

This is a suit by Ford Motor Company, the owner of property on which construction was performed, against W. F. Holt & Sons, Inc., the general contractor, for indemnity for sums paid for the personal injury of an employee of the subcontractor, Bristol Steel & Iron Works. The general contractor by third party complaint seeks to recover from the subcontractor the amount of any judgment obtained against the general contractor.

The general contractor contracted to erect for the owner additions to certain existing structures. The contract contained an Indemnity Clause 31,[1] indemnifying the owner against its own negligence with the exception of injuries and damages occurring by reason of the "sole negligence" or "willful misconduct" of the owner or his employees. By memorandum designated as a purchase order, there was an assignment of the structural steel work to the subcontractor. In open court, all parties conceded that the effect of the wording of such memorandum was that the subcontractor assumed, as to the Indemnity Clause 31, the same contractual indemnify relationship to the general

[1] The entire indemnity clause is reproduced as an addendum to this Memorandum.

contractor as that existing between the general contractor and the owner.

A portion of the construction required attaching or tying steel to a portion of the existing structure. In that portion of the existing structure where the accident occurred, the owner's plant was in operation. As a part of this operation there was an overhead crane which, spanning the entire structure, moved on tracks situated on steel beams along the outer walls of the structure. The crane, manually operated by a person in the cab thereof, traversed a distance estimated as being some 1000 feet. From track to track the width of the crane was estimated as being 40 to 60 feet. It consisted of two cross beams joined at the ends adjacent to the building walls by cross members so as to form a rectangular steel frame. The cab was suspended from the center of the rear cross member, approximately 20 to 30 feet from the side walls. The cross members, although level on the top, are arced on the bottom side with the low point of the sag being the center. The front beam and the back beam of the crane are approximately 10 feet apart so as to permit a trolly to run thereon from side to side.

When the crane is moving so that the front beam is between the cab and the destination of the crane, the field of vision of the crane operator in the cab is obstructed by the front beam to a distance of 100 to 150 feet in front of said front beam. The crane was operated by an employee of the owner.

Prior to the accident, the general contractor had cut an opening in the end wall of an existing structure, the opening being 7 to 9 inches wide and extending in length approximately 40 feet parallel to the ground. The opening was slightly below the tracks of the crane. A crew of the subcontractor was tying steel from the outside of the existing structure to the existing structure. To assist in the operation, one of the employees of subcontractor, with-

out notifying owner or general contractor, went inside the existing structure and climbed to the opening. While inside the structure the employee Elizer was struck and injured by the crane while it was in use in owner's production procedure.

The uncontroverted proof is that at the time of the accident Elizer was physically on the crane track. Furthermore, in the performance of his work, he was not required to be on the track. In fact, while on the track he could not perform his job. Without objection thereto, a superintendent testified that in order to rest, Elizer had probably stepped up to the track rather than climb down the wall to the ground. Elizer knew of the existence of the crane, admitted that if he had looked he could have seen the crane move, but stated he did not look. He admitted that the crane made some noise but asserted that the crane did not sound its siren. He stated it was his understanding that the owner's safety rules required that the horn be sounded. In addition, he asserted that a person on the ground, directing the crane operator, was supposed to keep a lookout ahead of the crane.

The owner had a safety engineer at the construction site. It had certain safety rules concerning "stops" to be placed on the crane rails, flagmen or hookers (a person on the ground directing the crane operator in the movement of the loads), and the blowing of the crane siren each time before the crane moved. Furthermore, it had a regulation that the supervisor in the building who was in charge of the owner's production should be notified prior to the entry of any construction worker into the area.

Of interest to the Court was the fact that the owner's employees did not agree in their testimony as to the existence of all these safety rules. Nor could they state positively that same had been specifically called to the attention of the general contractor or the subcontractor.

The only safety regulation about which there was no variance and no dispute as to notice to general contractor and subcontractor was that no construction worker was to enter the owner's working area without notice to the owner's supervisor.

It is uncontroverted in the record that no such notice was given prior to the injury of employee Elizer.

Mr. Elizer instituted suit on January 2, 1968, against the owner, alleging that his injuries which occurred on April 14, 1967, were caused by the sole negligence of the owner. By letters dated January 8, 1968, and December 3, 1968, the general contractor was "vouched in" by owner's representatives.[2] However, the general contractor refused to take over the defense or take any positive action. Thereafter, the owner effected a settlement of the claim of Mr. Elizer for the sum of $25,000 and obtained a general release. The defense expenses of the owner, attorneys' fees, etc., amounted to $1,031.90.

It is the opinion of the Court that, based on the evidence before this Court, the jury could reasonably have found that:

(1) Elizer was guilty of proximate negligence which caused the accident;

(2) Elizer was guilty of contributory negligence which proximately contributed to the accident;

(3) the owner was guilty of negligence which contributed to the accident; or

(4) the owner was guilty of proximate negligence which alone caused the accident.[3]

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[2] Although the amount of the final settlement was not made available to contractor, the Stipulation filed in this cause reflects a stipulation by all parties that the amount of the settlement was reasonable. Thus, no prejudice having occurred, this Stipulation completes the "vouching in" process.

[3] The trial court at the conclusion of all the evidence would probably have felt obligated to deny a motion for a directed verdict in favor of the owner.

Faced with these contingencies, the owner called upon the general contractor to assume its responsibility under the indemnity agreement. The general contractor chose not to take control of the case. Thereafter, the owner opted to buy its peace.

Certainly the general contractor is in no position to complain of the choice made by the owner. The indemnity contract provided that the general contractor would indemnify owner against claims. On demand it failed and refused to do so, and thereby bound itself to a reasonable and good faith defense or settlement of the action by Ford Motor Company. Certainly it is not within the spirit of the indemnity clause that the owner must defend all claims to a legal conclusion at its risk. It seems logical that if the minds of reasonable men might differ as to causation, the owner should not be required to run the risk of loss and expense of trial.

Since the indemnity agreement provides for indemnifying the owner against its own negligence (eliminating sole negligence and willful misconduct), the Court feels that the owner is entitled to recover against the general contractor. **Brogdon v. Southern Railroad**, 384 F.2d 220; **Southern Railroad v. Foote Mineral**, 384 F.2d.224.

It is accordingly so held.

There is another compelling reason for the owner to prevail. This is that the accident was not caused by the "sole negligence" of the owner. From the evidence, after taking into consideration the intelligence, frankness, demeanor and attitude of the witnesses, it is clear that the injured employee, Elizer, was guilty of negligence which proximately contributed to the accident. The general contractor asserts that this negligence would have barred the recovery of Mr. Elizer in the original cause and thus should bar the recovery of the owner. In line with the reasoning above, this contention is rejected. Under the

indemnity clause and the complaint in this cause, the only issue is whether the owner's negligence was the "sole negligence."

The general contractor, after being "vouched in," did not in turn call or officially request the subcontractor to accept the defense of the personal injury claim, nor assume the payment of any judgment rendered. As far as the evidence in this cause indicates, the subcontractor was not apprised of the claims of the injured employee, the acts of negligence asserted by him, the defenses raised by the owner, the settlement negotiations, nor the settlement made as the result thereof. As far as this record indicates, the settlement, release and suit compromise were submitted to the subcontractor for the first time by the filing of the third party complaint.

The subcontractor, the third party defendant, asserts that the owner was not liable, and that if the owner was not liable, the subcontractor was not liable. The subcontractor further asserts, without contradiction, that it was never notified of the pending claim or action and was never given an opportunity to appear and defend. Lack of notice to the subcontractor, as indemnitor of the general contractor, of the pending action does not prevent an action by the general contractor, as indemnitee. Such a lack of notice, however, ". . . throws the burden of proof on the indemnitee . . . to establish all actionable facts. Under such circumstances the indemnitor is free to contest the validity of the judgment and the liability of the indemnitee." 42 C.J.S., Indemnity, § 32(e)(2), p. 618. As it has been held by this Court that the employee was guilty of negligence which proximately contributed to the accident, and would have served to bar Mr. Elizer's recovery in the original cause, the general contractor, as indemnitee, has failed to sustain his burden of proof regarding his legal liability in the original action. This

Court therefore finds that the general contractor is not entitled to indemnification from the subcontractor and so holds.

The attorney for Ford Motor Company will prepare, submit to opposing counsel and file with the Court within fifteen (15) days from the date hereof, a judgment in accordance with this Memorandum.

(Illegible)
United States District Judge

CONTRACTOR'S RESPONSIBILITY FOR PERSONAL INJURIES AND PROPERTY DAMAGE (31)

The Contractor shall be exclusively responsible for, shall bear, and shall relieve the Owner from liability for all loss and/or expense and/or damage and/or claims resulting from bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person or persons, and/or on account of damage to or destruction of property, including that of the Owner, and/or on account of loss of use of such property (except as otherwise specifically provided in the section hereof entitled "Owner's and Contractor's Responsibilities—Fire and Certain Other Risks"), arising out of, or in connection with the performance of any work called for by this Contract, including all work assigned to the Contractor under this Contract, whether such loss, expense, damage, and/or claims be caused by or result, in whole or in part, from the negligence or other conduct of the Contractor, any Subcontractor and/or the Owner, or any of the employees, agents or servants of any of them, or any other person or persons whatsoever, except that, anything to the contrary notwithstanding contained herein, the Contractor shall neither be responsible nor relieve the Owner from liability for the willful misconduct or the sole negligence of the Owner or any of its employees, agents or servants.